

GULLETT, SANFORD, ROBINSON & MARTIN, PLLC

230 FOURTH AVENUE, NORTH, 3RD FLOOR
POST OFFICE BOX 198888
NASHVILLE, TENNESSEE 37219-8888

TELEPHONE (615) 244-4994
FACSIMILE (615) 256-6339
WWW.GSRM.NET

GARETH S. ADEN
LAWRENCE R. AHERN III
G. RHEA BUCY
CHRISTOPHER W. CARDWELL
GEORGE V. CRAWFORD, JR.
GEORGE V. CRAWFORD III
A. SCOTT DERRICK
THOMAS H. FORRESTER
MARCY S. HARDEE
M. TAYLOR HARRIS, JR.
DAN HASKELL
ANDRA J. HEDRICK
DAVID W. HOUSTON IV
LINDA W. KNIGHT
JOEL M. LEEMAN
ALLEN D. LENTZ
JOSEPH MARTIN, JR.
JEFFREY MOBLEY

WM. ROBERT POPE, JR.
WAYNE L. ROBBINS, JR.
JACK W. ROBINSON, JR.
JACK W. ROBINSON, SR.
VALERIUS SANFORD
WESLEY D. TURNER
PHILLIP P. WELTY
JOHN D. LENTZ
OF COUNSEL
B. B. GULLETT
1905-1992

November 2, 2001

VIA HAND DELIVERY

Mr. David Waddell
Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37201

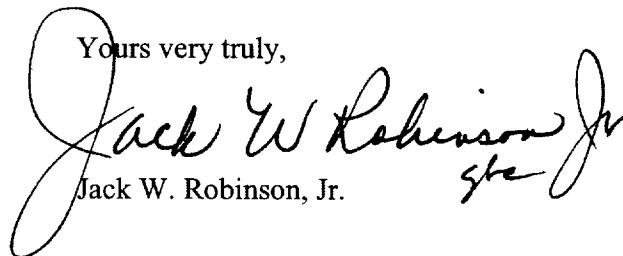
In Re: *Docket to Determine the Compliance of BellSouth Telecommunications, Inc.'s
Operations Support Systems with State and Federal Regulations*
Docket No: 01-00362

Dear Mr. Waddell:

Enclosed for filing are the original and thirteen copies of the Reply to Response of BellSouth to Motion of AT&T and SECCA for Summary Finding.

Copies are being served on all known counsel of record.

Yours very truly,


Jack W. Robinson, Jr.

JWRjr/ghc
Enclosures

cc: Parties of Record
Sylvia Anderson, Esq.
Garry Sharp

**BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE**

In re:)	
)	
Docket to Determine the Compliance)	
of BellSouth Telecommunications, Inc.'s)	
Operations Support Systems with State)	Docket No.: 01-00362
and Federal Regulations)	

**REPLY TO RESPONSE OF BELL SOUTH TO MOTION
OF AT&T AND SECCA FOR SUMMARY FINDING**

AT&T Communications of the South Central States, Inc. and TCG MidSouth, Inc.
(collectively "AT&T") hereby submit its reply to the Response of BellSouth to Motion of AT&T
and SECCA for Summary Finding that was filed with the Tennessee Regulatory Authority
("TRA" or "Authority") on October 29, 2001.

Throughout its response, BellSouth mischaracterizes the Motion for Summary Findings
(the "Motion") filed by AT&T and SECCA . The Motion does not seek entry of a summary
judgment. The Motion also does not seek a determination that BellSouth's OSS are not reliable.
Rather, the Motion seeks a summary finding that third party tests results cannot be determined to
be reliable for use in Tennessee because the entities that conduct such tests will not cooperate in
the conduct of this docket. Making such a finding at this stage of the proceeding is the
functional equivalent of striking the third party tests from the record at the time of the Phase II
hearing.

The Authority created the instant docket "to determine whether existing data or test
results derived from OSS testing in other states is reliable and applicable to Tennessee and, in
those instances where reliance on such testing is inappropriate, to conduct necessary testing."
(Order Approving First Report and Recommendation of the Pre-Hearing Officer, dated July 27,

2001, at 2-3.) Initially, the Authority contemplated engaging a third-party consultant to assist in the evaluation of the regionality of BellSouth's OSS and the reliability of existing data and test results from other states. For various reasons, the Authority decided to use the contested case process instead of a third party consultant. In so doing, the Authority recognized that it was asking CLECs to play the role of the third party consultant. Accordingly, the Authority allowed CLECs to conduct reasonable discovery and rejected BellSouth's attempts to limit that discovery at the pre-hearing conference on October 9, 2001 (the "October Pre-Hearing Conference").

The Authority divided the contested case into two phases. Phase I will investigate the regionality of BellSouth's operation support systems ("OSS"). If BellSouth's OSS are not regional, then existing data or test results derived from OSS testing in other states would not be relevant. Phase II will investigate, among other things, whether the Authority can reasonably rely on test results from other states as part of its future evaluation of BellSouth's OSS compliance with state and federal requirements. If such data or tests results cannot be proven to be reliable, the Authority should find that such "evidence" is either inadmissible or is not probative.

The question posed by the Motion for Summary Findings is whether the Authority can make an affirmative determination in Phase II that test results from other states are reliable without the full cooperation of the entities that conducted those tests. The CLECs advised the Authority at the October Pre-Hearing Conference of their concern that the entities that conducted the third party tests of BellSouth's OSS (KPMG, Hewlett Packard, and Ernst & Young) may not cooperate in the conduct of this docket. Our concerns proved to be justified when these parties did not respond to discovery requests. To bring this matter to the attention of the Authority, we filed a Motion for Summary Findings on October 21, 2001.

The Motion for Summary Findings focused on the issue of reliability of test results from other states, which is part of Phase II of this docket. We contend that without the full cooperation of the entities that conducted the third party tests in Georgia and Florida, the Authority cannot reasonably determine that those test results are reliable. Full cooperation consists of complying with written discovery, making employees available for depositions and, most importantly, producing witnesses at the hearing for cross examination.

Third party test results are equivalent to expert opinion testimony. Without the full cooperation of the "experts" that rendered the opinion, the Authority's ability to probe into the basis of the expert opinion is materially restricted. For example, if the third-party testers do not testify at the hearing, the Authority will not be able to observe and conduct a cross examination of these "experts" or judge their credibility. Indeed, the test reports would be hearsay and potentially inadmissible. *See* T.C.A. § 4-5-312 (providing that "[t]o the extent necessary for full disclosure of all relevant facts and issues, the administrative judge or hearing officer shall afford all parties the opportunity to . . . conduct cross-examination"); T.C.A. § 4-5-313 (providing that affidavits shall not be admitted into evidence if an opportunity to cross-examine the affiant at the hearing is not afforded).

Our Motion for Summary Findings did have the positive effect of persuading KPMG to allow the use in Tennessee of discovery obtained in Georgia and North Carolina. That discovery consists of documents and depositions concerning the Georgia test. KPMG, however, has stated that it will not respond to discovery concerning the Florida test because of alleged directions

from the Florida Public Service Commission.¹ KPMG also has stated that it does not intend to produce witnesses to testify under oath at a hearing. Thus, as it stands today, it is highly unlikely that full cooperation from the third party testers will be forthcoming.

We contend that the Authority will not have sufficient evidence to properly evaluate the specified Phase II issues without the full cooperation of the third party testers. The Authority will have little if any evidence regarding the reliability of the Florida third party test. The Authority also will not have opportunity to observe and participate in the cross examination of the third party testers at the Phase II hearing. Given these limitations, the Authority must decide whether it can otherwise determine that the third party test results from other states are reliable for use in Tennessee. If the Authority cannot reasonably reach such a determination with these limitations, then the Authority should make the requested summary findings and avoid wasting additional time and resources.

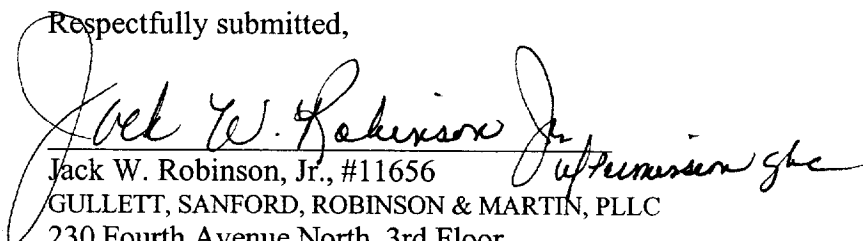
BellSouth argues that it is being "penalized" because of the conduct of entities outside of its control. That simply is not true. As a preliminary matter, we find it hard to believe that BellSouth cannot convince its vendors to cooperate. In any event, BellSouth is the one that contends additional OSS testing is not necessary because the Authority can rely on third party test results in other states. The Authority would not be penalizing BellSouth by simply requiring that BellSouth produce as witnesses the people that actually conducted the test and arrived at the

¹ The Florida Public Service Commission is concerned about maintaining the integrity and blindness of the ongoing test if discovery were to occur. We share these concerns. It is our understanding, however, that the Florida Public Service Commission is open to finding ways to address its concerns and accommodate discovery at the same time. One possibility is to schedule the Phase II hearing for a reasonable period after the completion of the Florida test. Discovery and the filing of testimony for Phase II can take place during that reasonable period.

test results upon which BellSouth urges the Authority to rely. Indeed, it would be the CLECs that would be penalized if BellSouth is allowed to enter what is tantamount to expert testimony without the opportunity to cross exam the expert before the Authority as required by Tennessee state law.

In sum, we submit that the Authority cannot reasonably make an affirmative determination on the reliability of third party tests without full compliance with the discovery approved by the Authority and without witnesses from the third-party testers being available for cross examination at the Phase II hearing. As it stands today, such cooperation will not be forthcoming. Accordingly, we respectfully request that the Authority find it cannot reasonably determine that OSS test results from other states are reliable for use in Tennessee. Without reliable test results from other states, the Authority should move forward with necessary third party testing of BellSouth's OSS.

Respectfully submitted,

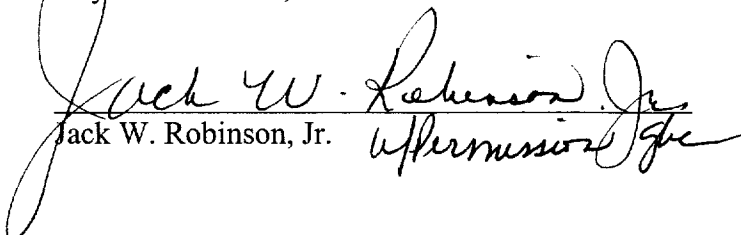

Jack W. Robinson, Jr., #11656
GULLETT, SANFORD, ROBINSON & MARTIN, PLLC
230 Fourth Avenue North, 3rd Floor
P.O. Box 198888
Nashville, TN 37219-8888
(615) 244-4994

Sylvia E. Anderson
AT&T
1200 Peachtree Street, N.E.
Suite 8068
Atlanta, GA 30309
(404) 810-4196

Attorneys for AT&T Communications of the
South Central States, Inc. and TCG MidSouth, Inc.

CERTIFICATE OF SERVICE

I, Jack W. Robinson, Jr., hereby certify that I have served a copy of the foregoing Reply to Response of BellSouth to Motion of AT&T and SECCA for Summary Finding on the following known counsel of record, by facsimile and by depositing a copy of the same in the United States Mail, postage prepaid, this 2nd day of November, 2001.


Jack W. Robinson, Jr. *with permission of the*

Guy M. Hicks, Esq.
BellSouth Telecommunications, Inc.
333 Commerce Street, Suite 2101
Nashville, TN 37201-3300

Charles B. Welch, Jr., Esq.
Farris, Mathews, Brannan,
Bobango & Hellen, PLC
618 Church Street, Suite 300
Nashville, TN 37219

Henry Walker, Esq.
Boult, Cummings, Conners & Berry, PLC
414 Union Street, Suite 1600
P. O. Box 198062
Nashville, TN 37219-8062

James Wright, Esq.
United Telephone-Southeast
14111 Capitol Blvd.
Wake Forest, NC 27587

Jon E. Hasting, Esq.
Boult, Cummings, Conners, & Berry, PLC
P. O. Box 198062
Nashville, TN 37219-8062

H. LaDon Baltimore, Esq.
Farrar & Bates
211 Seventh Avenue, N. #320
Nashville, TN 37219-1823

Timothy Phillips, Esq.
Office of Tennessee Attorney General
P. O. Box 20207
Nashville, TN 37202

Fred J. McCallum
Lisa Foshee
BellSouth Telecommunications, Inc.
675 W. Peachtree Street, Suite 4300
Atlanta, GA 30375

Maureen Flood
Competitive Telecom Association
1900 M. Street, NW #800
Washington, DC 20036